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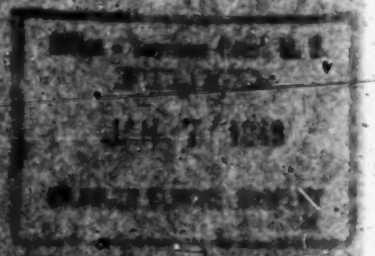

No. 370

# In the Supreme Court of the United States

OCTOBER TERM, 1947

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FONG HAW TAN, PETITIONER,

v.

ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO, CALIFORNIA

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE RESPONDENT

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the circuit court of appeals and the concurring opinion (R. 24–29) are reported at 162 F. 2d 663.

### JURISDICTION

The judgment of the circuit court of appeals was entered June 25, 1947 (R. 30). The petition for a writ of certiorari was filed September 24, 1947, and was granted November 10, 1947 (R.

32). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether an alien who receives a sentence of life imprisonment under an indictment in two counts charging him with the commission of two murders, the jury having returned a separate verdict of guilty on each count and fixed the punishment in each verdict at life imprisonment, is "sentenced more than once" to imprisonment for one year or more because of conviction of a crime involving moral turpitude, within the meaning of Section 19 (a) of the Immigration Act of 1917, whereby such an alien is subject to deportation.

## STATUTE INVOLVED

Section 19 (a) of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended (8 U. S. C. 155 (a)), provides in pertinent part:

> SEC. 19 (a) * * * except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall,

upon the warrant of the Attorney General, be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; * * * *.

## STATEMENT

On May 10, 1946, petitioner, an alien resident of the United States, filed in the District Court of the United States for the Northern District of California a petition for a writ of habeas corpus (R. 2–6) alleging that he was admitted into the United States for permanent residence in August 1910 and had thereafter continuously resided in this country; that he was being detained in custody under an order of deportation issued by the Attorney General in November 1941 charging that he was subject to deportation under Section 19 (a) of the Immigration Act of 1917, *supra*, in that he had been, after May 1, 1917, sentenced more than once to a term of imprisonment of one year or more because of conviction in this country of a crime involving

moral turpitude, to wit, murder; that the only time he had ever been sentenced to imprisonment because of conviction in this country of a crime involving moral turpitude was on July 21, 1925, when he was sentenced in Fresno, California, to imprisonment in the State penitentiary for the crime of murder alleged to have been committed on May 22, 1925, from which term of imprisonment he was later paroled; and that consequently the Attorney General had no power under the Immigration Act to order him deported.

An order to show cause was issued (R. 6–7) and a return made (R. 7–8). Respondent attached to his return, as Exhibit A, a copy of the warrant of deportation and the entire proceedings pertaining thereto.[1]

It appears from respondent's Exhibit A that on June 11, 1925, an indictment in two counts was filed in the Superior Court of Fresno County, California, charging that on or about May 22, 1925, in Fresno County, petitioner murdered one Lai Quan (count 1) and that on or about the same date, also in Fresno County, petitioner murdered one Ong Kim (count 2). Following a trial by jury, petitioner was found guilty on both counts. The jury's verdict read:

> We, the Jury * * * find the defendant, Ong Ton[2] guilty of murder in the First

[1] This exhibit is not contained in the printed record, but is filed as an original exhibit with the Clerk of this Court.

[2] It appears from Exhibit A that "Ong Ton" was an alias of petitioner.

> Degree, as charged in the First Count of the Indictment, and fix the punishment at life imprisonment * * *.
>
> We, the Jury * * * find the defendant, Ong Ton Guilty of Murder in the First Degree, as charged in the Second Count of the Indictment, and fix his punishment at life imprisonment * * *.[3]

The judgment and sentence of the court read:

> That whereas, The said Ong Ton having been convicted of the crime of Murder of the First Degree on two separate counts
>
> It is Therefore Ordered, Adjudged and Decreed, That the said Ong Ton be punished by imprisonment in the State Prison of the State of California at San Quentin for a period of his natural life, or until legally discharged.

While petitioner was incarcerated in San Quentin a hearing was held before an immigration inspector to determine whether petitioner was subject to deportation. Certified copies of the indictment, verdict, and sentence were produced at the hearing. Petitioner stated that he did not wish to be represented by an attorney and that he was not resisting deportation. The inspector recommended that petitioner be deported. That recommendation was approved by the Second Assistant Secretary of Labor, and on March 20,

[3] Section 190 of the California Penal Code provides that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same * * *."

1926, a warrant of deportation was issued directing petitioner's deportation to China when he was released from imprisonment. On November 14, 1941, the Department of Justice, to which the Immigration and Naturalization Service had been transferred, issued an amended warrant of deportation in substantially the same terms.

Petitioner was released from San Quentin in February 1942 into the custody of the Immigration Service. Since deportation to China was then impossible, he was released on his own recognizance, and remained at large until 1946, when he was again taken into custody for deportation to China. Thereafter he filed the petition for habeas corpus challenging the validity of his detention.

On August 12, 1946, the district court denied the petition for habeas corpus "Upon the authority of *Nishimoto* v. *Nagle*, 44 Fed. 2d 304, Cir. 9" (R. 8). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed (R. 24–30), one judge stating in a concurring opinion that he had "serious doubts whether Congress intended the deportation statute to apply to a case like this," and that he concurred in the affirmance "only for the reason that this court, in *Nishimoto* v. *Nagle*, 44 F. 2d 304, has already decided the point, and should, until higher authority has spoken, follow that decision" (R. 29).

## SUMMARY OF ARGUMENT

I. Section 19 (*a*) of the *Immigration* Act of 1917 requires the deportation of an alien who is "sentenced more than once" to imprisonment for for a term of one year or more for a crime involving moral turpitude. As applied to the many different factual situations which may arise under the normal practice of alleging several offenses in one indictment or trying several different indictments at the same time, the phrase "sentenced more than once" is so ambiguous that a different interpretation has been given to it in every circuit which has been called upon to pass upon the question. Neither the legislative history nor the administrative construction are of much aid in dispelling the confusion.

A. *The Judicial Interpretation.*—The Ninth Circuit Court of Appeals takes the view that conviction for any two crimes brings an alien within the purview of the statute regardless of the nature of the sentences imposed or the relation of the offenses to each other. *Nishimoto* v. *Nagle,* 44 F. 2d 304.

The Second Circuit Court of Appeals takes the view that an alien who has been given consecutive sentences is sentenced more than once, whereas an alien who is given concurrent sentences is sentenced only once, even though the crimes may be distinct. *Johnson* v. *United States,* 28 F. 2d 810; *United States ex rel. Mignozzi* v. *Day,* 51 F. 2d 1019.

The Fourth Circuit Court of Appeals takes the view that an alien who commits two crimes which arise out of separate transactions is deportable whether or not the sentences imposed are to run concurrently or consecutively. *Tassari* v. *Schmucker*, 53 F. 2d 570.

The Fifth Circuit Court of Appeals holds that sentences must have been imposed on two different occasions, and that the imposition of two sentences at different times is sufficient regardless of whether the sentences are to run concurrently or consecutively. *Wallis* v. *Tecchio*, 65 F. 2d 250.

B. *The Legislative History.*—The legislative history of the statute is not very enlightening. The portion of the statute involved was introduced as an amendment on the floor of the House, and the discussion which followed indicates that Congress did not have in mind the special problems arising out of multiple court indictments or simultaneous trials or pleas of guilty to separate indictments. The legislative history does show, however, an intention to deport "confirmed" criminals and an assimilation of the class of confirmed criminals, with persons who had been convicted of a second crime involving moral turpitude.

C. *The Administrative Construction.*—There is no settled administrative construction of the statute which can be deemed controlling. While, for a time, the Immigration Service did accept the decision of the Fifth Circuit in *Wallis* v.

*Teechio,* 65 F. 2d 250, the files of the Department reveal that the failure to seek review of that decision was in large part influenced by the expectation that legislative changes would obviate the problem.

II. In view of the judicial and administrative confusion, the proper construction of the statute becomes a matter for *de novo* consideration by this Court.

Administratively, the easiest construction to follow is that of the Ninth Circuit that conviction for any two offenses is sufficient regardless of the nature of the crimes or the form of sentence. And since a person sentenced on separate counts, whether concurrently, consecutively or generally, is sentenced for more than one crime, and thus sentenced more than once, this construction comes within the literal language of the statute. However, as applied to situations where one transaction forms the basis of several counts of an indictment, such an interpretation does not appear to be in accord with the Congressional purpose as revealed by the meager legislative history of the statute.

On the other hand, taking an extremely literal view of the word "sentence," it can be said with the Circuit Court of Appeals for the Fifth Circuit that a person is not sentenced more than once unless there are two separate acts of sentencing. This view, however, would allow an alien who commits two wholly unrelated offenses

to escape deportation, and require the deportation of a person who was separately tried for two crimes arising out of one transaction. It thus does not appear to be in accord with the Congressional purpose.

The Second Circuit's view that the number of terms of imprisonment imposed is controlling seems to us even more unsatisfactory, since sentencing procedure is not so standardized that it can be said that the decision of one judge who gives long concurrent terms on several counts reflects a different view of the nature of the crime from that of another judge who gives shorter consecutive sentences on several counts.

The view that seems to us most reasonably to accord with both the language of the statute and its purpose is that an alien who is convicted of crimes arising out of two distinct transactions is sentenced more than once for the purpose of deportation, regardless of the form the sentence may take. This interpretation will present administrative difficulties since the question whether two transactions are or are not distinct will undoubtedly be difficult to determine, as this very case shows. Nevertheless, it seems to us to be the view most nearly in accord with the Congressional purpose to deport persons who by engaging in two separate and distinct criminal transactions reveal that they are "criminals at heart."

III. If the construction which we suggest is the proper one, then it becomes important to deter-

mine whether petitioner's conviction for two murders on or about the same day represented in reality one transaction or two.

There is sound basis, we think, for taking the view that each intentional attack upon a separate person is a separate criminal act, different in character from a transaction essentially single, such as the making and possession of a counterfeit plate. In that view, the judgment below should be affirmed.

If, however, this Court feels that even separate murders committed as part of one quarrel should be deemed one crime for the purpose of deportation, the record in this case offers an insufficient basis upon which to determine petitioner's deportability. At the hearing preceding the deportation order, no evidence was introduced to show whether the crimes for which petitioner was convicted were or were not separate and distinct. Although, at the hearing, petitioner stated that he did not resist deportation, the Government has no desire to hold him to that waiver, if he is not in fact a person subject to deportation. Hence, if this Court should hold that the fact of two murders is not in itself sufficient to establish distinctivity of offenses, we suggest that the cause be remanded to the immigration authorities for further hearing on the question of petitioner's deportability.

## ARGUMENT

### I

### THE PROBLEM OF APPLYING THE STATUTORY PHRASE "SENTENCED MORE THAN ONCE" TO MULTIPLE COUNT INDICTMENTS AND JOINT TRIALS HAS CREATED A CONFUSED SITUATION WHICH IS NOT DISPELLED BY THE LEGISLATIVE HISTORY OR THE ADMINISTRATIVE CONSTRUCTION

Section 19 (a) of the Immigration Act of 1917 requires the deportation of an alien "who is sentenced more than once" to imprisonment for a term of one year or more for a crime involving moral turpitude. The phrase "sentenced more than once" has a deceptive simplicity which resolves into ambiguity as soon as an attempt is made to apply it to the many different factual situations which may arise under the normal practice of alleging several offenses in one indictment or trying several different indictments at the same time. Is a person who receives consecutive sentences of one year on two counts, both of which are based on the same transaction, sentenced more than once? Is the situation different if he receives concurrent sentences of two years on each count? Is a person who receives concurrent sentences on the same day on pleas of guilty to two indictments, based on wholly unrelated offenses, sentenced more than once? Is the situation different if the pleas are made and sentence pronounced on separate days? These and similar problems have troubled the courts with the result that the phrase "sentenced more than once" has

been given a different interpretation in every circuit which has been called upon to pass upon the question.

A. THE JUDICIAL INTERPRETATIONS OF THE STATUTE

1. *The view that conviction for any two crimes brings an alien within the purview of the statute regardless of the nature of the sentences imposed or the relation of the offenses to each other.*

The most stringent view of the statute is that taken by the Circuit Court of Appeals for the Ninth Circuit in *Nishimoto* v. *Nagle*, 44 F. 2d 304, on the authority of which the instant case was decided. In the *Nishimoto* case the alien pleaded guilty to issuing five different checks with intent to defraud,[4] and was sentenced on each count to imprisonment for indeterminate terms, the sentences to run concurrently. The court held that the alien was deportable under Section 19 (a), pointing out that each offense was a separate crime and that a pardon as to any one count would not affect the others. It said (44 F. 2d at p. 306):

> * * * It will be observed that the statute does not limit the power of deportation to a second conviction, but is based upon the commission of a number of offenses for which the alien has been sentenced. The form of the sentence is obviously of no consequence. The purpose

[4] The files of the Department reveal that in that case the checks were all issued on the same day.

> of Congress undoubtedly was to provide for the deportation of a man who committed more than one offense involving moral turpitude for which he had been convicted and upon which conviction and sentence has been imposed; whether the sentence runs concurrently or consecutively is entirely immaterial from the standpoint of the purpose of the law. * * *

Apparently the same view was taken by the Circuit Court of Appeals for the First Circuit in *Clark* v. *Orabona*, 59 F. 2d 187, certiorari denied, 287 U. S. 629, although under the particular facts of that case the decision is also consistent with other views discussed below. There the alien had shot and wounded two men in a poolroom brawl and was charged in two indictments with assault with intent to murder. On his plea of *nolo contendere*, a sentence to imprisonment for 4½ years was imposed on one indictment, and imposition of sentence was deferred on the other. After his release on parole he again became involved in a shooting affair, but was acquitted on one of the two indictments returned against him as a result of that incident. The other indictment was not tried but the alien was sentenced to seven years' imprisonment on the earlier indictment on which sentence had been deferred. The district court held that the petitioner was not deportable under Section 19 (a) since the two offenses for which he had been sentenced arose out of a single incident and did not represent two successive

outbursts of moral turpitude. *Orabona* v. *Clark*, 53 F. 2d 101 (D. R. I.). The circuit court of appeals reversed, stating in its opinion that there was no evidence that the offenses for which the alien had been sentenced were not the result of separate voluntary acts. 59 F. 2d at p. 189. It should be noted, however, that in that case separate sentences had been imposed at different times to run for different periods. The decision therefore presents no clear-cut standard as to what factors should be considered controlling in determining whether an alien has been sentenced more than once.

2. *The view that the form of sentence determines the applicability of the statute regardless of the nature of the crime.*

The Circuit Court of Appeals for the Second Circuit is apparently committed to the view that the question whether an alien has been sentenced more than once depends upon the nature of the sentences imposed, i. e., that an alien who has been given consecutive sentences is sentenced more than once, whereas an alien who is given concurrent sentences is sentenced only once, even though the crimes may be distinct.

The first case to come before that circuit, and the earliest decision construing the statute in question, was *Johnson* v. *United States*, 28 F. 2d 810. There the alien had been charged in a single information with statutory arson com-

mitted at different times at different buildings, and was sentenced to consecutive sentences of one year or more on each of four counts. The district court ordered his release on the ground that there was only one act of sentencing, *United States* v. *Johnson*, 26 F. 2d 288 (D. Conn.). The circuit court of appeals reversed, stating (28 F. 2d at p. 811):

> * * * It is reasonable to differentiate between an alien who has committed a single offense and one who has repeatedly offended. There would be no reason to make the classification turn on mere formalities of criminal procedure. Whether two crimes shall be prosecuted in two counts of a single indictment or information, or in separate indictments and with separate trials, depends upon considerations of convenience and expedition in judicial administration which can have no relation whatever to a classification of aliens for deportation. Under the relator's contention the prosecuting official of Connecticut may determine, by the mere form in which he prosecutes an alien who has committed two offenses of the same character, the latter's liability to deportation. Such an intention should not be attributed to Congress unless the statutory language compels it. It clearly does not. In its natural and reasonable meaning "sentenced more than once to such a term of imprisonment" refers to the number of separate crimes for which sentences are imposed, not to the form of

the indictment or the procedure of a single trial.

A few years later the court had before it the case of *United States ex rel Mignozzi* v. *Day*, 51 F. 2d 1019, where the alien had pleaded guilty to indictments charging the possession and aiding in the passing and possession of several counterfeit bills. All the offenses were alleged to have been committed in a two-day period. The alien was sentenced generally to a term of seven years, the sentence to run concurrently. The circuit court of appeals, although expressly adhering to its former decision in the *Johnson* case, held that under the facts then before it, the alien was sentenced only once, since only one punishment had been imposed. It said (51 F. 2d at pp. 1020–1021):

> * * * We agree that each count in an indictment, like each indictment itself, is a separate charge, and that nothing is lost or gained by the form of pleading adopted. Moreover, there must be a judgment upon each charge, however pleaded, in order to dispose of it; the only judgment in a criminal case is the sentence; procedurally a general sentence to "run concurrently" is a separate sentence on each count. We are as clear, however, that although a judge does in this sense impose more than one sentence in such a situation, he sentences the convict to one term only; that, though he imposes several sentences, he exacts but one punishment; in short that he does not "more than once" sentence "to a term of

> imprisonment." It is the duplication of penalties which counts; and the test of these is practical, not procedural. * * *

The *Day* opinion also treated the offenses charged as arising out of one transaction (p. 1021) and might be explained on such ground,[5] but a later decision by the same circuit court of appeals indicates that the concurrence of sentences is the controlling factor in that circuit. *Guerricia* v. *Reimer*, 79 F. 2d 1019. The facts do not appear in the decision, but the Department files reveal that in that case the alien had pleaded guilty to four informations charging three separate robberies and one assault with intent to kill on separate days against separate persons. He was sentenced to imprisonment for eight years for each crime, the sentences to run concurrently. The court held that the alien was not deportable, stating:

> The majority of the court as now constituted differ from the rule announced in United States ex rel. Mignozzi v. Day (C. C. A.) 51 F. (2d) 1019, but reverse the order herein on that authority.

[5] Essentially the same situation was involved in *United States ex rel. Turco* v. *Commissioner*, 58 F. 2d 1087 (C. C. A. 2), in which, the Department files reveal, the alien received concurrent sentences for seven attempts to pass counterfeit money in a three-day period.

3. *The view that the nature of the crimes committed is determinative irrespective of the form of sentence.*

The Circuit Court of Appeals for the Fourth Circuit takes the view that an alien who commits two crimes which arise out of separate transactions is deportable whether or not the sentences imposed are to run concurrently or consecutively.

In *Tassari* v. *Schmucker*, 53 F. 2d 570, the alien had been arrested for entering a store with intent to steal. While at liberty on bond he was again arrested, three months later, for entering another store with like intent. He was tried, convicted and sentenced on the second charge. Two months later he was tried, convicted and sentenced on the first charge, the latter sentence to run concurrently with the first. On these facts, the Circuit Court of Appeals for the Fourth Circuit held that, even though the alien was required to serve only a single term of imprisonment, he had been sentenced more than once within the meaning of the statute. After discussing the Second and Ninth Circuit cases referred to above, the court said (53 F. 2d at p. 573):

> In our opinion the correct principle to be deduced from these decisions is that where the crimes are separate and distinct and there is a separate sentence for each offense it must be held within the meaning of the

> act that the alien has been "sentenced more than once" even though the separate sentences are made to run concurrently and not consecutively. * * *

It is, of course, true that on the facts in that case there were two separate acts of sentencing but the court seems to emphasize the separate nature of the crimes rather than the time when sentence was imposed.

4. *The view that the time of sentence governs irrespective of the nature of the crimes or the form of sentences imposed.*

The Circuit Court of Appeals for the Fifth Circuit takes a wholly different approach, holding that sentences must have been imposed at two different times, that the alien "must have burdened the country's courts with his prosecution, and have been publicly branded as a criminal by his sentence on at least two occasions." *Wallis* v. *Tecchio,* 65 F. 2d 250, 252. It held there that an alien who received consecutive sentences by one judgment on an information charging four offenses of passing and attempting to pass counterfeit money on separate occasions over an 18-day period had not been sentenced more than once, since he had appeared before the court for sentencing only once.[6]

---

[6] A similar view of the statute had been taken by Judge Sibley, who wrote the opinion in *Wallis* v. *Tecchio,* as a district judge. *Opolich* v. *Fluckey,* 47 F. 2d 950 (N. D. Ga.).

B. THE LEGISLATIVE HISTORY

As might be expected from the conflict of decisions in the various circuits, the legislative history of the statute under consideration is not very enlightening. The portion of the statute here involved was introduced as an amendment on the floor of the House. 53 Cong. Rec. 5167. We have set forth in the Appendix, *infra* pp. 34–37, the parts of the debate in the House and the Committee Report in the Senate which bear on this amendment. We find it inconclusive in relation to the situations arising out of multiple counts and joint trials of multiple indictments.

Congressman Sabath, who introduced the amendment, stated: "My amendment provides that after a second offense committed by such an alien, or where he has been for the second time convicted, the five-year limitation should not apply." Later on, he stated that he had no desire "to protect a real criminal, a man who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted." Congressman Burnett, a member of the Committee which sponsored the bill, stated that he agreed with Mr. Sabath that "those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency and they should then be deported." Still later, he talked about "men who served out their sentences and then renewed their

careers of crime." Subsequently he again talked about "the commission of the second offense."

The Senate Report on the measure refers to the debate on the floor of the House and states that the amendment was designed "to reach the alien who after entry shows himself to be a criminal of the confirmed type." (See Appendix, *infra*, p. 37.)

We think it is evident that neither Senate nor House had in mind the special problems arising out of multiple count indictments or simultaneous trials or pleas of guilty to separate indictments. This history shows that the legislative intention was to deport "confirmed" criminals, but also that the legislators assimilated the class of confirmed criminals with persons who had been convicted of a second offense involving moral turpitude. Nevertheless, we believe that this history supports to some extent the interpretation of the statute which we suggest *infra*, pp. 28–29, that the sentences must arise out of separate and distinct transactions.

C. *The administrative interpretation.* As the multiplicity of decisions reflects, there is no settled administrative construction of the statute which can be deemed controlling. Petitioner suggests that the failure of the Government to seek review of the decision of the Fifth Circuit in *Wallis* v. *Tecchio*, discussed, *supra*, p. 20, reflects an administrative acquiescence in the interpretation given to the statute by that Circuit, i. e., that an alien

must twice be brought before a court for sentencing in order to be "sentenced more than once." That interpretation was accepted for a time. The files of the Department reveal, however, that the failure to seek review of that and certain other unreported decisions to which petitioner refers was in large part influenced by the expectation that legislative changes would obviate the problem. In the years from 1925 to 1938 various bills were reported out of committee which would have clarified the question under consideration, either by eliminating entirely the five-year period of limitations and thus providing for deportation on conviction for one crime, or by providing for deportation on conviction of separate crimes on separate occasions. (68th Cong., 2d session, H. R. 11796, see H. Rep. 1292; 70th Cong., 1st session, H. R. 10078, see H. Rep. 484; 70th Cong., 2d session, H. R. 16850, see H. Rep. 2397; 71st Cong., 3rd session, S. 6172, see S. Rep. 1640; H. R. 17152, see H. Rep. 2799; 73rd Cong., 2d session, 9725, see H. Rep. 1772; 74th Cong., 1st session, S. 2969, see S. Rep. 1156; H. R. 8163, see H. Rep. 1110; 75th Cong., 1st session, H. R. 6391, see H. Rep. 618; 75th Cong., 3rd session, S. Rep. 1616.) A number of these bills were considered on the floor of Congress, and in 1925 and 1937, bills eliminating the five-year period of limitations passed the House, 66 Cong. Rec. 3445; 81 Cong. Rec. 5574. Since all the bills involved other changes in the statute, the failure of Congress to act on the vari-

ous proposals is of no significance on the question at issue. It merely explains the failure of the Government to seek a resolution of the conflicting decisions at the time the conflict appeared.

## II

### THE CONSTRUCTION MOST IN ACCORD WITH THE LEGISLATIVE INTENT SEEMS TO US THE VIEW THAT CONVICTION FOR DISTINCT TRANSACTIONS BRINGS THE ALIEN WITHIN THE STATUTE

In view of the judicial and administrative confusion, the proper construction of the statute is, we suggest, a matter for *de novo* consideration by this Court in the light of the language of the statute and its general purpose as revealed by its meager legislative history. The solution of the problem is not simple, for all of the interpretations given to the statute by the various circuit courts of appeal present difficulties of one kind or another.

Administratively, the view of the Ninth Circuit, that conviction for any two offenses is sufficient regardless of the nature of the crimes or the form of sentence, is probably the easiest to follow. Such an interpretation does come within the literal language of the statute. A person sentenced on separate counts whether concurrently, consecutively or generally, is technically sentenced more than once, each count being a separate offense, and the sentence being applicable to each

separate offense. A concurrent or general sentence on several counts is a sentence on each count, since if all but one count should be reversed on appeal, the sentence would still stand on the remaining count. Nevertheless, a transaction essentially single, such as the making of a counterfeit plate can form the basis for several counts of an indictment. See *United States* v. *Michener*, 331 U. S. 789, where a defendant was sentenced on separate counts charging that he caused a counterfeit plate to be made and that he possessed the plate with intent to make counterfeit currency. In the light of the legislative history, we doubt that a person convicted of two crimes arising out of a single transaction was the type of person whom Congress intended to cover by the statute now in question. It is, of course, true that a harsh application of the rule could be avoided by a judge's recommendation against deportation. But this presupposes that any time an alien is convicted after trial, or, as is even more common, any time he pleads guilty to a multiple count indictment arising out of a single transaction, he must bear in mind the possibility of deportation and call the judge's attention to the fact that he is an alien. It is questionable whether an alien, commiting what in common understanding would be considered only one offense, should be held to such an awareness of his legal vulnerability.

On the other hand, taking an extremely literal view of the word "sentence," it can be said with the Circuit Court of Appeals for the Fifth Circuit that a person is not sentenced more than once unless he is twice brought before court for sentencing, i. e., unless there are two separate acts of sentencing. This view, however, is likely to prevent the deportation of the very type of criminal which Congress did have in mind, and also to require the deportation of persons not within the Congressional purview. Thus an alien may have committed two wholly unrelated offenses at widely different times, and escaped apprehension for both for several years. When finally he is apprehended, he may be tried upon or may plead guilty to both indictments. (It is important to bear in mind in this connection that the majority of criminal cases are disposed of on pleas of guilty.[7]) Unless a judge makes certain to sentence the alien on different days, the alien cannot be deported no matter how numerous his crimes or how great his guilt. On the other hand, a prosecutor may decide to try an alien separately for two crimes arising out of one transaction. Unless a judge otherwise orders, the alien would be deportable even though both crimes arose out of a single course of action.

[7] See e. g., *Annual Report of the Director of the Administrative Office of the United States Courts*, 1946, Table D4, p. 120.

The rule in the Second Circuit with which the majority of that court have expressed disagreement (see *supra,* p. 18), that the number of terms of punishment imposed is controlling seems to us even more unsatisfactory. Sentencing procedure is not so standardized that one can say that the decision of one judge to give long concurrent terms on several counts reflects a different view of the nature of the crime from that of another judge who gives shorter consecutive sentences on several counts. As the *Michener* case referred to above shows, consecutive sentences may be imposed for a crime essentially single, and as the *Guerricia* case shows (*supra,* p. 18), concurrent sentences may be imposed for crimes which are really separate. An alien may commit a crime in jail long after he had been convicted and sentenced for a prior offense. Such a person is clearly the type of criminal whom Congress intended to deport. Yet if he happens to be serving a long sentence and the judge decides to give him a concurrent sentence for the second crime, he would not, under the holding of the Second Circuit, be considered deportable. The Second Circuit's test would also preclude deportation of a person who had been convicted of any number of separate and distinct murders or other offenses punishable by life imprisonment, since the life sentences normally would run concurrently, or of any offenses in which the sentences would run

concurrently with life imprisonment. Such a person too would obviously be of the type Congress meant to have deported. Furthermore, the rationale of these cases is erroneous for it is not correct to say that a person given a concurrent sentence is not sentenced "to a term of imprisonment." If the first conviction should be reversed, the defendant would still be held in prison under the second. The statute reads "sentenced more than once" to a term of imprisonment; not, sentenced to more than one term.

The view that seems to us most reasonably to accord with both the language of the statute and its purpose, as reflected by its legislative history, is that of the Fourth Circuit Court of Appeals, holding that an alien who is convicted of two separate and distinct criminal transactions is sentenced more than once regardless of the form the sentence may take. We think it would be hypertechnical to allow the question of deportation to rest, as petitioner would apparently have it rest, on whether the pronouncement of sentence was made on one day rather than the other, or whether it took the form of one paper rather than two. A general sentence on two counts is a sentence on each, and a concurrent sentence on each count is a sentence on each. The essential question, we think, is whether the alien has committed two separate and distinct offenses, in separate transactions, for which he has been convicted and sentenced. The legislative history sug-

gests that the criminal transactions must in substance constitute separate transactions.

This interpretation will present administrative difficulties. The question whether two crimes are or are not really separate will undoubtedly at times be difficult to determine. As the court below pointed out (R. 28):

> By what formula shall the permissible lapse of time between crimes be measured? How close must the crimes be related to each other? Must they derive from the same impulse? Do separate crimes of different natures committed to clear the way for a main objective come within the conclusion? The statute answers none of these obtruding questions.

Examples of the type of problems which may occur are the *Nishimoto* and *Day* cases involving a number of attempts to pass separate fraudulent or counterfeit securities within a short period of time. This very case, which we discuss, *infra*, may present such a problem.

Nevertheless, the view that the crimes must be distinct seems to us the one most nearly in accord with the general Congressional purpose, to deport aliens who by their conduct reveal that they are "criminals at heart." It would reach the persons whom Congress apparently contemplated—the persons who by engaging in two separate and distinct criminal transactions reveal that they are "criminals at heart."

## III

### IF DEPORTABILITY DEPENDS ON THE COMMISSION OF SEPARATE CRIMINAL TRANSACTIONS, THE RECORD IN THIS CASE MAY BE INSUFFICIENT TO DETERMINE THAT ISSUE

If this Court approves the construction of the statute which we have suggested as the most reasonable, i. e., that an alien is "sentenced more than once" for the purpose of deportation only if he has been convicted and sentenced for two separate transactions, then it becomes important to determine whether petitioner's conviction for two murders represented in reality one transaction or two. At the hearing before the immigration inspector in 1926, the only evidence introduced consisted of copies of the indictment, conviction, and sentence. The indictment charged him with murdering two persons on or about the same day. These might have been separate acts of the same class which could properly be tried together under Section 954 of the California Penal Code, or they might have been two killings in the course of a single quarrel. The record is silent on that point.

In dealing with crimes against the person, particularly homicide, there is sound basis, we think, for taking the position that, except for the theoretical case of one bullet killing two persons, each intentional attack upon a separate person is a separate criminal act, different in character from an essentially single transaction such as the mak-

ing and possession of the same counterfeit plate. Two separate human lives are involved; two separate acts of killing are ordinarily necessary to constitute two murders even if both arise out of the same quarrel. Such was apparently the view of the Circuit Court of Appeals for the First Circuit, in the *Orabona* case discussed, *supra*, p. 14–15, and we think it is a reasonable approach to the question of distinctivity of offenses where attacks on separate individuals are involved. If that view is correct, and if the construction of the statute which we suggest is the proper one, then the order of the circuit court of appeals should be affirmed on that basis.

On the other hand, it can be argued that Congress has not seen fit to differentiate between crimes against the person, even serious crimes like murder, and other crimes involving moral turpitude. This Court may therefore feel that two murders arising out of a single transaction should not be deemed two separate and distinct crimes for the purpose of deportation. In that event, the record before this Court offers an insufficient basis upon which to determine petitioner's deportability. As noted, all that respondent's Exhibit A shows is that petitioner committed two murders on or about the same day. These may have been two separate attacks

at different times, and thus clearly separate offenses, even though the underlying grievance may have been sufficiently related to permit a joint trial. But they may also have been two killings resulting from the same quarrel. Since, as set forth in the statement, petitioner, at his hearing in 1926, stated that he was not resisting deportation, he might well be held to have waived any right to contest the sufficiency of the proof on which the deportation order rested. However, the Government has no desire to hold petitioner to the waiver thus made in 1926, when he was not represented by counsel, even though he expressly stated that he did not desire to be represented by counsel. It seems that the immigration inspector did not believe that he was obliged to find distinctivity of offenses and no evidence was produced in respect thereto. If distinctivity is a necessary element to be established for deportation purposes, then we think the Government should be held to proof of that essential element. If, therefore, this Court should hold that distinctivity of offenses must be shown, and that the fact of two murders is not in and of itself sufficient to establish such distinctivity, we suggest that the cause be remanded to the im-

migration authorities for further hearing on the question of petitioner's liability to deportation.*

Respectfully submitted.

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JANUARY 1948.

* If this Court adopts the construction of the statute given to it by the court below, then of course, the judgment should be affirmed. If the view of the Fifth Circuit that there must be separate acts of sentencing is correct, then clearly no grounds exist for petitioner's deportation. If the Second Circuit's view, that the concurrence of sentence is a controlling factor, is adopted, then the question would arise whether a general sentence for life imprisonment on several counts where life imprisonment is mandatory in the absence of the death penalty, comes within the rationale of those cases. It would indeed be anomalous to hold that the pronouncement of a general sentence of mandatory life imprisonment on two counts, instead of two separate sentences of life imprisonment on the two counts, shows a determination by the judge that the crimes were single rather than separate.

# APPENDIX

The following discussion on the floor of the House of Representatives concerning H. R. 10384, which became the Immigration Act of 1917, is reported at 53 Cong. Rec. 5167–5168:

> Mr. SABATH. Mr. Chairman, I desire to offer the following amendment.
>
> The CHAIRMAN. The gentleman from Illinois offers an amendment, which the Clerk will report.
>
> The Clerk read as follows:
>
> On page 40, line 1, change the semicolon to a comma and insert "or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry."
>
> Mr. SABATH. Mr. Chairman, this is one of the sections of the bill which provides for the deportation of aliens who have actually been admitted into the United States. This particular section provides for the deportation of aliens who have committed offenses involving moral turpitude. The proviso that I desire to amend is this:
>
> Any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after the entry of this alien.
>
> My amendment provides that after a second offense committed by such an alien, or where he has been for the second time

convicted, the five-year limitation should not apply. In other words, even though he may have been residing in the United States for five years or more, if he is for the second time convicted of any offense or crime involving moral turpitude, he should be deported. The provisions in this act covering the majority of cases place the limitation at five years.

A little later on, after the adoption of this amendment, I am going to move to reduce the term from five years to three years, but I am offering this amendment to demonstrate that I have no desire to protect a real criminal, a man who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted. A man of that kind is a criminal and is not entitled to consideration on the part of any of the citizens of the United States.

* * * * *

I wish to say to my colleague from Illinois and the gentlemen of the House that I have strenuously opposed in the committee the five-year provision in this bill. I realize the hardship upon a man who has been a resident of this country for a number of years and then, through misfortune, commits an offense that might be considered a crime involving moral turpitude and is deported.

In view of the fact that the committee insisted upon doing away with any time limit whatever, in order to secure at least that five-year concession from the committee, I yielded for the time being and agreed to support the proposition that any alien who is sentenced for the second time for committing a second crime involving moral tur-

pitude should be deported, and that no time limitation should apply to him.

* * * * *

Mr. BURNETT. Mr. Chairman, I rise to support the amendment of the gentleman from Illinois [Mr. Sabath]. The gentleman is mistaken, however, in his idea that the committee wanted to remove the time limit as to those committing offenses in this country—the first offense. The police commissioner of New York was before the committee, and he showed an alarming condition in the prisons in regard to aliens who commit crimes after they come here, and he insisted that there should be no time limit as to the deportation of any of them this side of final citizenship. We believed, however, that it was a harsh rule, and every member of the committee believed that it would be a harsh rule—that if a man had come over here without any criminal record behind him being shown, and had lived an upright life here for 5 or 10 or 15 years, and then was convicted of a crime, to deport him would be unjust. Hence, we did not agree with the suggestion of the police commissioner of New York, who showed us an alarming number of records of prisoners who had come over and committed crimes after they had come here.

But the suggestion was then made by the gentlemen from Illinois [Mr. Sabath] that those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency, and they should then be deported; and the committee unanimously agreed with the gentleman that that ought to be done. The police commissioner wrote me a letter, in which he stated that upon examination of the prison records he found that there were a

great many of those cases, of men who served out their sentences and then renewed their careers of crime.

* * * * * *

Mr. BURNETT. I want to say, Mr. Chairman, that it was not the idea of the committee that there should be no limitation as to the first conviction, but on the commission of the second offense, showing that the man was really a criminal at heart, we believed that he ought to be deported.

Senate Report No. 352, 64th Cong., 1st sess., accompanying H. R. 10384, states in part as follows (pp. 14–15):

SECTION 19

* * * * * *

When the act was passed as H. R. 6060 it contained a new provision (still retained, p. 43, lines 1–6) for the deportation of aliens who commit serious crimes within five years after entry, the courts pronouncing sentence being authorized to recommend in any instance that deportations shall not occur (p. 44, line 20, to p. 45, line 2). As the act now stands the House has added, at the suggestion of its committee (vol. 53, Congressional Record, pp. 5932–5933),[1] a provision intended to reach the alien who after entry shows himself to be a criminal of the confirmed type, such aliens to be deported without limitation on the length of time after entry when they commit a second serious offense (p. 43, lines 6–9); * * *.

[1] These page references are erroneous. The correct pages are 53 Cong. Rec. 5167–5168.

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# SUPREME COURT OF THE UNITED STATES

No. 370.—October Term, 1947.

Fong Haw Tan, Petitioner,
v.
Arthur J. Phelan, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 2, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

An alien "who is sentenced more than once" to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed after his entry shall, with exceptions not material here, be deported. Section 19 (a)[1] of the Immi-

[1] Section 19 (a) so far as material here provides:

". . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Attorney General, be taken into custody and deported . . . . The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after termination of his imprisonment . . . ."

gration Act of February 5, 1917, 39 Stat. 889, as amended 54 Stat. 671, 8 U. S. C. § 155 (a). It appears that petitioner, a native of China, was convicted of murder under each of two counts of an indictment, one count charging the murder of one Lai Quan, the other charging the murder on or about the same date of one Ong Kim.[2] The jury fixed the punishment for each murder at life imprisonment. He was thereupon sentenced to prison for the period of his natural life by one judgment, construed by the Circuit Court of Appeals to impose that sentence on him for each of the convictions. Sometime thereafter a warrant for his deportation to China issued. Later he was paroled, released from prison, and taken into the custody of the Immigration Service. He then filed a petition for a writ of habeas corpus challenging the legality of his detention. The District Court denied the petition on the authority of *Nishimoto* v. *Nagle*, 44 F. 2d 304. The Circuit Court of Appeals affirmed. 162 F. 2d 663. The case is here on a petition for a writ of certiorari which we granted because of the contrariety of views among the circuits concerning the meaning of the statutory words, "sentenced more than once."

The Ninth Circuit view is that a conviction and sentence for more than one offense, whether at the same or different times and whether carrying concurrent or consecutive sentences, satisfy the statute. That was the position taken in *Nishimoto* v. *Nagle*, *supra*, and followed below. The Second Circuit holds that an alien who is given consecutive sentences is sentenced more than once, while an alien who is given concurrent sentences is not, even though the crimes are distinct. *Johnson* v. *United States*, 28 F. 2d 810; *United States ex rel. Mignozzi* v. *Day*, 51 F. 2d 1019. The Fourth Circuit takes the posi-

[2] Whether the two murders resulted from one act or from two does not appear.

tion that the statute is satisfied whether or not the sentences imposed run concurrently or consecutively provided that the two crimes which are committed and for which separate sentences are imposed arise out of separate transactions. *Tassari* v. *Schmucker*, 53 F. 2d 570. The Fifth Circuit takes the view that an alien is "sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again." *Wallis* v. *Tecchio*, 65 F. 2d 250, 252. That view is an adaptation of the position taken earlier by a District Court in the same circuit that Congress by this provision aimed to deport "repeaters," *viz.* "persons who commit a crime and are sentenced, and then commit another and are sentenced again." *Opolich* v. *Fluckey*, 47 F. 2d 950.

The latter is the reading we give the statute. There is a trace of that purpose found in its legislative history. Congressman Sabath who proposed the provision as an amendment said it was aimed at the alien "who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted." 53 Cong. Rec. 5167. Congressman Burnett, who was in charge of the bill on the floor of the House, gave the same emphasis when he said that the amendment proposed "that those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency, and they should then be deported." *Id.*, p. 5168. The Committee Report in the Senate put the matter into sharper focus when it stated that the provision was "intended to reach the alien who after entry shows himself to be a criminal of the confirmed type." S. Rep. No. 352, 64th Cong., 1st Sess., p. 15. Perhaps the plainest "confirmed type" of criminal is the repeater. We give expression to that view by reading

this provision of the statute to authorize deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it.

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 333 U. S. —. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

*Reversed.*